Supreme Court, U.S.
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No. 99-244

IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. Mobil's Petition demonstrated that the Federal Circuit's decision contravenes basic contract law principles in holding (1) that North Carolina's consistency objection under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1456(c)(3), was an independent and supervening "cause" of Mobil's "damages" which destroyed Mobil's right to restitution, and (2) that the 1996 repeal of the Outer Banks Protection Act ("OBPA"), 104 Stat. 484, 555, during the pendency of North Carolina's CZMA objection (but four years after Mobil filed suit) effectively nullified the anticipatory repudiation that arose with the enactment of the OBPA. Because it cannot successfully defend either of these propositions, the Government simply ignores Mobil's arguments. This head-in-the-sand approach cannot obscure either the magnitude of the errors below or their significance for the Outer Continental Shelf ("OCS") leasing program, as well as many others in which the Government collects large front-end bonus payments from private investors. *See* Pet. 20-23.

a. Causation. Mobil's Petition, pp. 12-16, demonstrates that, under this Court's decisions and uniformly acknowledged principles of contract law, a party's right to obtain restitution in response to an anticipatory repudiation is absolute and does not depend upon proof of actual damages or causation. *See Ankeny v. Clark*, 148 U.S. 345, 353 (1893) (holding that it is "invariably true" that "whenever" one party anticipatorily repudiates a contract, the other party has "thereupon" a "right" to rescind and seek restitution); *Restatement (Second) of Contracts* § 373 (1981) (upon a repudiation an injured party is "entitled" to restitution of "any" benefit conferred).

The Government's opposition does not even attempt either to deny Mobil's argument or to distinguish the

authorities upon which it rests. To the contrary, the Government continues to defend the decision below on the ground that North Carolina's CZMA objection was an independent "cause" of Mobil's damages. *See* Opp. 11 (arguing that in view of North Carolina's CZMA objection, the OBPA "essentially had no effect"); Opp. 13 (contending that none of Mobil's losses "resulted from" the OBPA); Opp. 15 (noting that "in view of the State's objection under the CZMA, it is obvious that the OBPA did not in fact cause any … delay"). *See also* Opp. 13, where the Government cites *Sun Oil Co. v. United States*, 572 F.2d 786 (Ct. Cl. 1978), as "rejecting a claim for damages for the government's delay of OCS permit approvals *where other independent causes supported the same delay*." (emphasis added).[1]

The Government's refusal come to grips with Mobil's argument – coupled with its emphasis that the Federal Circuit relied entirely on causation in denying Mobil's claim to restitution – in and of itself shows the argument's merit.

b. Repeal. The Government similarly persists in relying upon the repeal of the OBPA, as if it could cure the anticipatory repudiation that occurred upon the Act's passage. Thus, the Government refers to the "limited period that the OBPA was in effect," Opp. 13, and insists that because the OBPA "has been repealed" it "obviously" has no effect on Mobil, Opp. 14. But, as with causation, the Government

[1] The Government's reliance on *Sun Oil* reveals that it persists in misdescribing and arguing this case if it were about "delay damages." But as Mobil made clear in its rehearing petition in the Federal Circuit and again in its Petition in this Court, this case is not about delay damages. Rather, as stated by the dissenting judge below – and as effectively acknowledged by the majority below in its second opinion, which deleted references to "delay damages" – Mobil "just wants its money back." Pet. App. 17a.

makes no attempt to counter Mobil's argument that the OBPA's repeal in 1996 – four years after Mobil filed suit and a month after the Court of Federal Claims' decision in the case – could not effect a timely and valid retraction of the Government's anticipatory repudiation. As Mobil pointed out in its Petition, a retraction is valid only "if notification … comes to the attention of the injured party before he materially changes his position in reliance on the repudiation." Pet. 17 (quoting *Restatement (Second) of Contracts* § 256 (1981)). "The bringing of a suit by the promisee for the anticipatory breach is one sort of reliance making retraction impossible." *Id.* (quoting 4 Arthur L. Corbin, *Corbin on Contracts* § 980, at 931 (1951)).[2]

2. The Government's attempt to massage the obvious conflict between the Federal Circuit's decision below and the Ninth Circuit's decision in *Far West Federal Bank, S.B. v. OTS*, 119 F.3d 1358 (9th Cir. 1997), and to escape this Court's decision in *United States v. Winstar*, 518 U.S. 839 (1996), is wholly unconvincing.

a. *Far West*. The conflict between the Federal Circuit's decision and the Ninth Circuit's decision in *Far West* (a *Winstar*-like case arising out of Congress's enactment of FIRREA) could hardly be clearer: Here, the Federal Circuit relied on causation to deny restitution for an anticipatory repudiation; in *Far West*, the Ninth Circuit

[2] The Government's suggestion on page 5 of its opposition that North Carolina lodged its CZMA objection to Mobil's Plan of Exploration ("POE") prior to the enactment of the OBPA is misleading. The only "objection" that North Carolina made in July 1990 was a generic objection to Mobil's voluntarily-submitted "proposed" POE – *not* a consistency objection under the CZMA. North Carolina did not object under the CZMA until November 14, 1990, three months *after* the enactment of the OBPA. (A. 313).

expressly found causation irrelevant and, on that basis, awarded restitution for an anticipatory repudiation. Specifically, in words equally applicable here, the Ninth Circuit in *Far West* held that in emphasizing a lack of causation, the Government had "misse[d] the point" of restitution relief:

> At the moment OTS announced its intention to impose FIRREA regulation on Far West, the Government repudiated [its contract]. Following repudiation, the Investors had the *absolute right* to cease their own performance and to obtain rescission and restitution.

Far West, 119 F.3d at 1365 (emphasis added). The Ninth Circuit found "simply no basis in contract law" for the proposition – the same one that is the basis for the Federal Circuit's decision below – that to obtain restitution an injured party "would have to prove that [it] suffered consequential damages." *Id.*

b. *Winstar*. The Government also either misperceives or simply ignores the conflict between the panel majority's opinion and this Court's decision in *Winstar*. As Mobil pointed out in its Petition, the whole point of *Winstar* is that, "when the Federal Government enters into contractual arrangements with private parties, it must play by the same rules as everyone else." Pet. 23 (cataloguing quotations from *Winstar*). The rules governing private-party contracts are clear. According to this Court, the lower federal courts, the state courts, the *Restatement*, and prominent contract law scholars, upon an anticipatory repudiation by one private party to a contract, the other private party has an absolute right – without regard to causation – to rescind and obtain restitution. *See* Pet. 12-16. Under *Winstar*, parties

contracting with the Government possess that same absolute right.

3. Recognizing that established law so fundamentally undermines its position, the Government has resorted to meritless arguments designed to divert the Court's attention from the important issues of law at stake in the case.

a. Contractual Conditions Precedent. In an effort to make it appear that Mobil is at fault in this litigation – and therefore undeserving of restitution – the Government invokes the concept of "contractual conditions precedent." Specifically, it asserts that "[b]ecause petitioners failed to satisfy [a] contractual condition precedent to their right to explore under the leases" – namely, their purported obligation to obtain CZMA approval from North Carolina – "they lack any basis for asserting a claim for restitution in this case." Opp. 11.

Once again, the black letter law condemns the Government's position. As Professor Corbin observed:

> A repudiation or other total breach by one party enables the other to get a judgment for damages or for restitution *without performing acts that would otherwise have been conditions precedent*. It is no longer necessary for the plaintiff to perform or to tender performance.

Corbin, *supra*, § 977, at 920 (emphasis added). Indeed, in *Citizens National Bank v. Davisson*, 229 U.S. 212 (1913), this Court held that "familiar principles" dictate that where one party "repudiate[s] and abandon[s]" a contract, the other party is "absolved ... from any further performance of

conditions precedent on [his] part." *Id.* at 224 (citing *Roehm v. Horst*, 178 U.S. 1, 8, 16 (1900)).[3] The Court of Federal Claims below recognized and applied this "familiar principle[]" when it held that "[i]t is not necessary for plaintiffs [even] to have actually submitted exploration plans" – much less, actually obtained CZMA clearance – "because it is clear defendant cannot and will not perform its end of the bargain as required by OCSLA." Pet. App. 73a.

b. OCS Lands Act § 1351. The Government insinuates that Mobil is not entitled to restitution because the OCS Lands Act ("OCSLA") does not expressly provide such a remedy. Citing 43 U.S.C. § 1351(h)(2)(A), the Government argues that "[t]he statute does not ... provide for restitution or other compensation when development plans are disapproved because of the objection of a State under the CZMA." Opp. 11.

The Government's argument is doubly flawed. First, and most importantly, Mobil has never claimed a right to restitution *under the OCSLA*; rather, it claims a right to restitution *under the common law* that governs federal government contracts, as applied by the courts and as

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[3] Other courts – both state and federal – have likewise acknowledged that an anticipatory repudiation excuses a party from compliance with conditions precedent. *See, e.g., Hidalgo Properties, Inc. v. Wachovia Mortgage Co.*, 617 F.2d 196, 199 (10th Cir. 1980) ("A party is excused from tendering performance of conditions precedent when the other party repudiates the contract."); *Builder's Concrete Co. v. Fred Faubel & Sons, Inc.*, 373 N.E.2d 863, 868 (Ill. Ct. App. 1978) ("When one party to a contract repudiates his contractual duties before time for performance, the other party may elect to treat the contract as ended. In such cases the nonbreaching party is not required to tender performance or to comply with conditions precedent.").

summarized and reported in the *Restatement* and leading treatises. *See* Pet. 12-16.

Second, far from supporting the panel majority's decision, § 1351(h)(2)(A) actually confirms Mobil's common law rights to restitution in this case. Although § 1351 does state that lessees "shall not be entitled to compensation" *under the OCSLA* in the event of a CZMA consistency objection, that provision applies only to oil and gas *plans of development and production* ("PODs"), not to *exploration plans* ("POEs"). The exploration stage of an OCS project – the one at issue in this litigation – is governed by § 1340(c), which, quite unlike § 1351(h), is silent as to compensation where exploration is blocked by a CZMA objection. Congress's decision expressly to address in § 1351 the financial consequences of a CZMA objection at the production stage, when contrasted with its silence in § 1340 with respect to the exploration stage, strongly supports Mobil's common law claim to restitution in this case. *See Hohn v. United States*, 118 S. Ct. 1969, 1977 (1998) ("Where Congress includes particular language in one section of a statute but omits it in another ... it is generally assumed that Congress acts intentionally."); *United State v. Texas*, 507 U.S. 529, 535 (1993) (noting that a clear expression of Congress's intent is necessary "to supplant the existing common law in [the] area").[4]

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[4] The Government's attempted invocation of § 1351 defies the Federal Circuit's decision. Following the Government's lead, the Federal Circuit in its original opinion below relied upon § 1351 in denying Mobil's claim to restitution. *See* Pet. App. 36a-37a. However, in response to Mobil's petition for rehearing pointing out the court's error, the Federal Circuit amended its opinion to remove the mistaken citation to § 1351. *See* Pet. App. 14a.

c. Settled Precedents. The Government asserts that the decision in this case merely requires a "straightforward application" of this Court's "settled precedents." Opp. 10. However, the Government can muster only a single citation to a "precedent[]" of this Court – *Secretary of the Interior v. California*, 464 U.S. 312 (1984). That case does not begin to support the Federal Circuit's radical departure from the universally recognized contract law principle that an injured party has an absolute right to obtain restitution in response to an anticipatory repudiation. Instead, the Court in *California* simply held that a CZMA consistency determination is not required for the Government's sale of OCS oil or gas leases, *see id.* at 315, and acknowledged that exploration must survive CZMA scrutiny, *see id.* at 339, a point no one disputes here. Nothing in *California* – or in any other decision of this Court – suggests that the Government may legislatively repudiate its contractual obligations with impunity.

The Government is correct that "settled precedents" govern this case. But those "precedents" confirm the Federal Circuit's error. The dispositive decision is not *California*, as the Government suggests, but *Ankeny v. Clark*, which upheld a party's absolute "right" to obtain restitution "whenever" another party anticipatorily repudiates a contract.

d. Materiality. The Government seems to suggest (albeit elliptically) that the OBPA did not constitute a "material breach" of Mobil's OCS lease agreements. *See* Opp. 12. Upon inspection, however, the Government's purported materiality argument simply devolves, along with the rest of its brief, into an argument about causation. At bottom, the Government simply recycles and reiterates the misguided refrain that Mobil cannot recover because its losses did not "result[] from" the OBPA but were instead caused by the fact that "North Carolina independently objected to the CZMA certification." Opp. 13.

Moreover, the Government has not disputed that the panel majority never questioned the Court of Federal Claims express "find[ing]" that "the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.'" Pet. 12 (quoting Pet. App. 71a). To the contrary, as Mobil pointed out in its Petition, the panel majority actually *agreed with* the Court of Federal Claims' assessment that the OBPA could not be reconciled with the terms of Mobil's leases. *See* Pet. 12 (citing Pet. App. 9a-10a).

Finally, the Government's reliance upon *Thomas v. HUD*, 124 F.3d 1439 (1997), brings to this Court's attention a case that Mobil cited to the Federal Circuit which that court ignored. In that case, Thomas entered into a settlement agreement with HUD under which he agreed to resign two years later in return for the agency's promise not to disclose any information about his personnel record. As his departure date approached, HUD responded to a Department of Justice ("DOJ") inquiry about Thomas, revealing unfavorable information regarding his personnel history.

The Federal Circuit held that HUD had materially breached the settlement agreement and concluded that Thomas was therefore "entitled" to rescind the contract and withdraw his resignation, notwithstanding sworn testimony from DOJ officials that the information they received from HUD about Thomas's employment history "would not influence their view of his employability." *Id.* at 1442. Thus, the Court upheld Thomas's material breach argument and affirmed his right to rescind even though the Government's breach had not "caused" Thomas any specific harm. Any other holding, the court determined, would "permit the agency that willingly entered into such an arrangement to breach it without being held responsible." *Id.* And to allow that, the Federal Circuit quite correctly concluded in words equally applicable to this case, "would be

to condone what would essentially be an empty promise made by the government." *Id.*

CONCLUSION

As its opposition reveals, the Government has failed to come to grips with the legal errors that lie at the heart of the Federal Circuit's decision. The Government has also not provided an explanation that avoids the conflict that the Federal Circuit has created with the decisions of both the Ninth Circuit and this Court. Finally, the Government ignores the wide-ranging implications of the Federal Circuit's decision, which, if allowed to stand, would wreak havoc in fields of government contracting ranging from mineral leasing to timber harvesting to telecommunications licensing and threaten billions of dollars in private investment. For these reasons and for those set forth in Mobil's Petition, the Court should grant the Petition.

Respectfully submitted,

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